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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)

The Pay Telephone Reclassification and
Compensation Provisions of the
Telecommunications Act of 1996)

CC Docket No. 96-128

ORDER ON RECONSIDERATION

Adopted: October 20, 2004

Released: October 22, 2004

By the Commission:

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I. INTRODUCTION

1. In this Order, we consider four petitions for reconsideration¹ of our *Report and Order* adopted on September 30, 2003,² which established detailed rules (the “rules” or “Payphone Compensation Rules”) ensuring that payphone service providers (PSPs) are “fairly compensated” for each and every completed payphone-originated call pursuant to section 276 of the Communications Act.³ For the reasons set forth below, we clarify and modify our Payphone Compensation Rules and, in doing so, grant one of the petitions in full, two in part, and deny the fourth.⁴

II. BACKGROUND

2. The Payphone Compensation Rules, which became effective on July 1, 2004, require that the last facilities-based long distance carrier in a call path – either an interexchange carrier or a switched-based reseller (SBR) – be responsible for compensating PSPs for coinless access code and subscriber toll-free calls that are completed on that long distance carrier’s platform.⁵ For local calls (or intra-LATA calls), where a local exchange carrier (LEC) completes a coinless access code or subscriber toll-free call, that LEC is responsible for compensation.⁶ The Payphone Compensation Rules define these carriers as “Completing Carriers,”⁷ set forth a mechanism whereby the Completing Carriers may satisfy their PSP compensation obligations,⁸ and give the PSPs legal tools, where there had been none before, to enforce these obligations.⁹ The rules also permit Completing Carriers and PSPs to opt out of the rules. A

¹ APCC, the RBOC Coalition, Sprint, and AT&T filed petitions. Appendix A lists the commenters in this proceeding and the abbreviations we use to refer to them. APCC also filed a Request for Stay of the rules adopted in the *Report and Order* pending disposition of its petition for reconsideration. In light of our action herein addressing APCC’s petition, APCC’s Request for Stay is moot.

² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 18 FCC Rcd 19975 (2003) (*Report and Order*).

³ 47 U.S.C. § 276. We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act, or the Act. See 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁴ We grant AT&T’s petition, grant APCC’s petition in part, grant Sprint’s petition in part, and deny the RBOC Coalition’s petition.

⁵ *Report and Order*, 18 FCC Rcd at 19976, para. 3. The terminating LEC of a long distance call is not responsible for payphone compensation. 47 C.F.R. § 64.1300(a).

⁶ If a facilities-based long distance carrier completes an intra-LATA coinless access code or subscriber toll-free call, the facilities-based long distance carrier is liable for PSP compensation, not the terminating LEC. See 47 C.F.R. § 64.1300(a).

⁷ 47 C.F.R. § 64.1300(a) (defining carriers that are liable to PSPs for payphone-originated calls that terminate on the carriers’ platforms).

⁸ See 47 C.F.R. §§ 64.1310 *et seq.*

⁹ See 47 C.F.R. §§ 64.1310, 64.1320 *et seq.* (requiring Completing Carriers to institute an audited call tracking system, to pay on a quarterly basis, to have their chief financial officers (CFOs) certify the accuracy of the payments, (continued....))

Completing Carrier may employ alternative reporting and compensation arrangements, other than those mandated by the rules, so long as the PSP agrees to these arrangements.¹⁰

3. In implementing these rules, the Commission found a "fair" compensation plan for every "completed call" required the "entity that: (1) is the primary economic beneficiary of PSP services; and (2) has control over the most accurate call completion data to compensate the PSPs."¹¹ The Commission found that, in cases where multiple facilities-based long distance carriers are involved in the transmission of a payphone-originated call, the last facilities-based long distance carrier in the call path that completes the call to the called party is the "primary economic beneficiary" and the "carrier best able to track payphone calls to completion."¹² In instances where an SBR completes a call dialed by the SBR's customer from a payphone, the Commission reasoned that the SBR was the primary economic beneficiary because the SBR's customer pays the SBR for the payphone call.¹³ The Commission also found that the facilities-based carrier completing the call was the only carrier capable of knowing whether a call had been "completed" (answered by the called party), that the carrier has access to all other data necessary to determine whether it had completed a payphone-originated call, and thus that carrier had control over the most accurate data on completed calls, which would better ensure that PSPs were paid for each and every completed call.¹⁴

4. The Commission then devised a compensation plan designed to address two problems that had plagued prior compensation plans: (1) due to the structure of the payphone-long distance network architecture, PSPs were unable to identify and locate Completing Carriers that owed them compensation;¹⁵ and (2) Completing Carriers had demonstrated no incentive to acknowledge that they had completed payphone-originated calls, much less an incentive to track such calls accurately in order to calculate compensation owed the PSPs.¹⁶

5. *Responsibilities of the Completing Carrier.*¹⁷ To address these problems, the Payphone Compensation Rules require a Completing Carrier to:

(Continued from previous page) _____
and to provide quarterly call reports; and requiring facilities-based long distance carriers, defined in the rules as "Intermediate Carriers," that switch calls to Completing Carriers to file quarterly call reports).

¹⁰47 C.F.R. 64.1310(a) (listing rules that are applicable to a Completing Carrier "[u]nless the payphone service provider agrees to other compensation arrangements").

¹¹*Report and Order*, 18 FCC Rcd at 19987, para. 26.

¹²*Id.* at 19988, 19991, paras. 28, 35.

¹³*Id.* at 19988-89, para. 29.

¹⁴*Id.* at 19991-92, para. 35.

¹⁵*Report and Order*, 18 FCC Rcd at 19982-83, paras. 16, 18.

¹⁶*Id.*

¹⁷The Commission also addressed the penalties Completing Carriers face for violations of the statute and the rules. The Commission found that a "failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *Report and Order*, 18 FCC Rcd at 19989, para. 32 (citing 47 U.S.C. §§ 201(b), 276). For violations of its rules, the Commission noted that it could impose a forfeiture (continued....)

- identify itself as a Completing Carrier by filing a "System Audit Report" and a statement with the Commission including notice of these filings to PSPs;¹⁸
- establish detailed procedures for tracking payphone-originated calls to completion, for compensating the PSPs for those calls, and for resolving any disputes with PSPs over compensation;¹⁹
- engage a third-party auditor to verify that the Completing Carrier has in place these detailed procedures and to verify, on an annual basis, that the Completing Carrier's payphone compensation procedures continue to comply with our rules;²⁰
- permit PSPs to inspect any documents, including working papers, underlying the System Audit Report;²¹
- pay the PSPs on a quarterly basis;²²
- provide the PSPs a report on a quarterly basis that lists all completed calls and provide Completing Carrier contact information in case of any disputes;²³ and
- designate its chief financial officer (CFO) as the Completing Carrier officer responsible for ensuring that the company has in place personnel and procedures to comply with our rules such that the CFO may with confidence certify at the end of each quarter that the Completing Carrier's payphone payments are based on 100% of all completed calls.²⁴

6. *Responsibilities of Other Carriers.* In the event that a Completing Carrier does not identify itself to PSPs as the carrier responsible for payment, or disputes arise between a Completing Carrier and a PSP over the Completing Carrier's compliance with the rules, the Commission established other safeguards that would give PSPs the information they would need in order to identify, locate, and obtain compensation from the Completing Carrier. The Commission therefore imposed reporting requirements (Continued from previous page)

of up to \$120,000 for a single non-payment and up to \$1.2 million for a continuing violation. *Id.*, 18 FCC Rcd at 19998, para. 44. The Commission further stated that, in "egregious cases, we may issue an Order to Show Cause why we should not revoke a SBR's section 214 authority, and possibly bar the company's principals from participation in interstate telecommunications business activities without first obtaining explicit permission from the Commission." *Id.* In addition, an aggrieved party may file a complaint here or exercise its right to file a claim in federal court. See 47 U.S.C. §§ 207, 208.

¹⁸See 47 C.F.R. § 64.1320(b), (e) (explaining "System Audit Report" and statement).

¹⁹47 C.F.R. § 64.1320(c) (setting forth nine (9) requirements for a Completing Carrier's tracking system).

²⁰See 47 C.F.R. § 64.1320(a), (c), (d), (f).

²¹See 47 C.F.R. § 64.1320(g).

²²See 47 C.F.R. § 64.1310(a)(2).

²³See 47 C.F.R. § 64.1310(a)(4) ("quarterly report must include name, address, and number of person responsible for handling the Completing Carrier's payphone compensation").

²⁴See 47 C.F.R. § 64.1310(a)(3).

on an "Intermediate Carrier," defined in the rules as "a facilities-based long distance carrier that switches payphone calls to other facilities-based long distance carriers."²⁵ The Payphone Compensation Rules require an Intermediate Carrier to provide a quarterly report to a PSP that includes:

- a list identifying all facilities-based long distance carriers to which the Intermediate Carrier switched toll-free and access code calls dialed from each of that PSP's payphones;²⁶
- the toll-free and access code numbers dialed from each of that PSP's payphones that the Intermediate Carrier switched to the identified facilities-based long distance carrier;²⁷
- the total volume of calls switched to those numbers;²⁸ and
- the name, address, and telephone number of the person or persons for each identified facilities-based long distance carrier who serves as the Intermediate Carrier's contact at the identified carrier.²⁹

7. *Alternatives to the Payphone Compensation Rules.* The Commission found that this compensation plan satisfied section 276's directive that PSPs be "fairly compensated" for each and every completed call.³⁰ However, the Commission also recognized the value of permitting PSPs and the carriers to opt out of the Payphone Compensation Rules and agree to other compensation agreements that might better serve their business needs.³¹ Accordingly, the Payphone Compensation Rules specifically give parties flexibility to agree to other compensation arrangements and avoid complying with any or all of the Payphone Compensation Rules, including the payment, tracking, and reporting obligations of section 64.1310(a) and the audit requirements of section 64.1320 of our rules.³² For purposes of this *Report and Order*, other compensation arrangements will be called Alternative Compensation Arrangements (ACAs).

8. *Petitions for Reconsideration.* In its petition, the RBOC Coalition requests that the Commission reverse itself and place liability on the first, not the last, facilities-based long distance carrier in the call path of a payphone-originated call. APCC requests that rules be interpreted to mean that the first

²⁵ 47 C.F.R. § 64.1310(b). Thus, a LEC is not included in the definition of an Intermediate Carrier and is not required to comply with the reporting requirements of section 64.1310(c). See 47 C.F.R. § 64.1310(c); see also *Report and Order*, 18 FCC Rcd at 20002, para. 51 n.145 ("We note that with respect to these new reporting obligations, we do not include LECs that transfer calls to the first facilities-based long distance carrier.").

²⁶ 47 C.F.R. § 64.1310(c)(1).

²⁷ 47 C.F.R. § 64.1310(c)(2).

²⁸ 47 C.F.R. § 64.1310(c)(3).

²⁹ 47 C.F.R. § 64.1310(c)(4).

³⁰ See *Report and Order*, 18 FCC Rcd at 19987, 19992-93, 19998, 20003 paras. 26, 36-38, 44, 52.

³¹ See *id.* at 20000, para. 48.

³² See 47 C.F.R. 64.1310(a); see also *Report and Order*, 18 FCC Rcd at 20000, para. 48 ("[T]he SBR may enter into any other compensation arrangement voluntarily agreed to by the relevant parties.").

facilities-based long distance carrier be held liable in the event that the Completing Carrier does not pay. As discussed below, we decline to grant these requests because petitioners raise no new arguments that were not already considered in the *Report and Order*. APCC, AT&T, and Sprint also seek reconsideration and/or clarification of (1) alternative compensation arrangements to those required by the rules, (2) the reporting, certification, and data retention requirements, (3) the term "completed call," and (4) the obligations of a LEC under the Payphone Compensation Rules.

III. EXECUTIVE SUMMARY

9. In this Order, we:

- clarify that a Completing Carrier must give the PSP adequate notice of an Alternative Compensation Arrangement (ACA): (1) prior to its effective date with sufficient time for the PSP to object to an ACA; and (2) prior to the termination of an ACA;
- clarify that, in a complaint proceeding under the Payphone Compensation Rules, a Completing Carrier may assert as an affirmative defense that the PSP's objection to an ACA was unreasonable;
- clarify that Completing Carriers are required to report only completed calls in their quarterly reports;
- extend the time period that carriers must retain certain payphone records, for dispute resolution purposes, from 18 to 27 months;
- clarify that quarterly reports should use industry standard formats;
- clarify the responsibilities of LECs under the Payphone Compensation Rules;
- clarify that a Completing Carrier may post its System Audit Report and section 64.1320(e) statement on its website or on a clearinghouse's website, instead of transmitting these documents to every PSP;
- clarify that a completing carrier's chief financial officer (CFO) may issue a single, blanket certification, addressed to all PSPs to which the carrier owes compensation, certifying that compensation is based on 100% of all calls that the carrier tracked to completion; and clarify that such certification may be transmitted electronically or posted on the web; and
- find that where a clearinghouse is performing some of a Completing Carrier's compensation obligations, the Completing Carrier's auditor may rely upon, under certain circumstances, a third party's audit of the Clearinghouse.

IV. DISCUSSION

A. Completing Carrier Liability

10. APCC and the RBOC Coalition request that the first facilities-based long distance carrier to receive the payphone call from the originating LEC should be held liable to the PSP for a completed call,

rather than the Completing Carrier.³³ We decline to reverse our decisions made in the *Report and Order* and deny these requests. We conclude that APCC and the RBOC Coalition make no new arguments and present no new evidence that they were unable to present in the *Report and Order* proceeding.³⁴ In the *Report and Order*, we thoroughly addressed petitioners' arguments regarding a Completing Carrier's incentives to track and pay compensation, the administrative convenience of PSPs to recover compensation, the primary economic beneficiary responsible for compensation, the burdens of the new rules, the clarity of the rules, undercompensation, and overcompensation.³⁵ Nevertheless, we will once again briefly address some of their arguments here.

11. We disagree with APCC's argument that the Payphone Compensation Rules are ambiguous as to which carrier is liable for compensation in the event that an SBR does not obtain and file a "System Audit Report."³⁶ APCC contends that the rules should be interpreted such that, in the event this report is not filed, liability for calls completed by a SBR should default to the first facilities-based long distance carrier that received the payphone call from the originating LEC.³⁷ However, the rules and the *Report and Order* clearly place liability only on the SBR, if it is the facilities-based long distance carrier that completes the call.

12. Specifically, section 64.1300(a) states that, in instances where there is more than one long distance facilities-based carrier in a call path, the long distance facilities-based carrier that completes the call, defined in that section as the "Completing Carrier," is liable for payphone compensation.³⁸ This declaratory language makes clear that the last switch-based long distance carrier is always liable for compensation.³⁹ Neither section 64.1300 nor any other sections of this subpart even suggest that another carrier could be liable. Neither does any language contained in the *Report and Order*. Sections 64.1310 and 64.1320 of our rules set forth how a Completing Carrier may satisfy its payphone compensation liability.⁴⁰ Any failure of a Completing Carrier, such as a SBR, to comply with these sections would constitute a violation of our rules, but it would not result in liability for payphone compensation shifting

³³RBOC Petition at 5, 15; APCC Petition at 2. APCC alternatively requests that the Commission amend its rules to place default liability on the first facilities-based long distance carrier in the event that a "Completing Carrier" does not file a System Audit Report, does not renew this report under section 64.1320 of our rules, or does not pay payphone compensation. APCC Petition at 11, 13, 17.

³⁴See 47 C.F.R. § 1.429.

³⁵See APCC Petition at 4-5, 9-11, 14-15; RBOC Coalition Petition at 6-7, 11-13, 13-14.

³⁶APCC Petition at 2.

³⁷APCC Petition at 2. In support of its argument that the rules are ambiguous as to carrier liability when the Completing Carrier fails to file a "System Audit Report," APCC points to the first phrase of section 64.1320(a), which reads: "As a precondition to tendering payment pursuant to section 64.1310(a), all Completing Carriers must undergo a system audit...." APCC Petition at 2 (citing 47 C.F.R. § 64.1320(a)). According to APCC, this language means that if a Completing Carrier does not undergo a system audit, then liability "defaults," as APCC phrases it, to the first facilities-based carrier that received the payphone call from the originating LEC. See *id.*

³⁸47 C.F.R. § 64.1300(a).

³⁹See *id.*

⁴⁰47 C.F.R. §§ 64.1310, 64.1320.

to another carrier.⁴¹ Nevertheless, upon reconsideration of the rule language, we find that the phrase “as a precondition” might be incorrectly read to suggest that a Completing Carrier need not comply with section 64.1320. Compliance with section 64.1320 is obligatory, not conditional. Therefore, to avoid any possible ambiguity regarding a Completing Carrier’s obligation to obtain an audit, we will delete this phrase from the rule. As discussed below, however, we note that a Completing Carrier is released from this audit requirement if it enters into a private, alternative compensation arrangement to pay PSPs.⁴² Accordingly, as described in the following section, we add further clarifying language to the audit rule as it relates to private compensation arrangements.

B. Alternative Compensation Arrangements

13. In this section, we clarify that a Completing Carrier must give the PSP adequate notice of an Alternative Compensation Arrangement (ACA) (1) prior to its effective date with sufficient time for the PSP to object to an ACA; and (2) prior to the termination of an ACA. We also clarify that a PSP may not unreasonably object to an ACA between an SBR and interexchange carrier. In the event that a PSP brings a complaint alleging that a SBR has violated our payphone rules by either not conducting an audit or not having a private contract in place, the SBR may raise, as an affirmative defense, that the PSP has unreasonably objected to the governing contract between the SBR and the interexchange carrier.⁴³ As fully described below, if the Commission found that: (1) the PSP unreasonably objected to an ACA; and (2) that the SBR and the interexchange carrier had agreed to be bound by the ACA and the SBR was paying full compensation⁴⁴ under that ACA, then the Commission would deem that the PSP has consented to the ACA and find that the ACA is a valid, binding contract between the interexchange carrier and the SBR. The finding of a valid ACA would relieve the Completing Carrier from its audit, reporting, and tracking responsibilities found in section 64.1310(a) and section 64.1320 of the Commission’s rules.⁴⁵ In order to provide industry certainty in this regard, we provide guidance below on the types of objections we would find to be unreasonable in a Commission proceeding.⁴⁶

14. *Adequate Notice.* Our rules require a Completing Carrier to comply with the section 64.1310(a) and section 64.1320 tracking, reporting, and audit requirements “[u]nless the payphone service provider agrees to other compensation arrangements” made, for example, between an interexchange carrier and an SBR.⁴⁷ An ACA thus permits an SBR to opt out of all of these requirements through a suitable

⁴¹See *Report and Order*, 18 FCC Rcd at 19998, para. 44 (discussing Commission enforcement options against a carrier that does not comply with the Payphone Compensation Rules); see *id.* at 19989, paras. 30-32 (explaining why the Commission decided not to impose compensation liability on a third party).

⁴²See 47 C.F.R. § 64.1310(a).

⁴³We emphasize that, as a PSP’s unreasonable objection of an ACA is only an affirmative defense to a complaint under our rules, absent a complaint alleging that an SBR had violated our rules, we do not anticipate resolving disputes generally over whether an objection to a particular ACA provision by a PSP is reasonable.

⁴⁴By full compensation, we mean compensation pursuant to the terms of the ACA.

⁴⁵See 47 C.F.R. §§ 64.1310(a), 1320.

⁴⁶We anticipate that these same considerations would apply if a PSP exercised its right to file its claim in federal court. See 47 U.S.C. § 207.

⁴⁷47 C.F.R. § 64.1310(a); see also 47 C.F.R. § 64.1320; *Report and Order*, 18 FCC Rcd at 20000, para. 48.

agreement.⁴⁸ In the *Report and Order*, we encouraged all relevant parties to enter into ACAs because we believed it to be in the best business interests of smaller SBRs to do so, provided that the ACAs contained adequate protections for the PSPs.⁴⁹ In the *Report and Order*, we found that small SBRs with high payphone call completion rates would likely opt out of the rules and voluntarily pay compensation based on their interexchange carriers' tracking data rather than incur the expense of instituting their own call tracking systems, and noted that between 40% and 50% of SBRs already engage in this practice.⁵⁰

15. We agree with AT&T that, given the large numbers of PSPs, it would be unduly burdensome to require a Completing Carrier to obtain an affirmative act of approval from each PSP to an ACA.⁵¹ A small Completing Carrier simply does not have the financial resources to obtain advance agreements from so many PSPs prior to entering into an arrangement with a third party.⁵² Instead, we clarify that a Completing Carrier must give the PSP adequate notice of an ACA prior to its effective date with sufficient time for the PSP to object to the ACA.⁵³ We find AT&T's current practice of placing notice of

⁴⁸*Report and Order*, 18 FCC Rcd at 20000, para. 48.

⁴⁹*See id.*

⁵⁰*Report and Order*, 18 FCC Rcd at 20000, para. 48 n.136.

⁵¹AT&T Petition at 4-6. We therefore reject APCC's argument that PSPs must affirmatively consent to an ACA before it becomes valid. *See* Letter from Albert H. Kramer, Attorney, on behalf of APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 3 (filed June 15, 2004) (APCC June 15 *Ex Parte*). In support of its argument, APCC relies on a slamming opinion where the Commission found that carriers could not rely on negative option letters whereby they would change a consumer's primary long distance company if the consumer did not tell them otherwise. APCC June 15 *Ex Parte* (citing *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Report and Order, 10 FCC Rcd 9560, 9565-66 (1995)). That opinion is inapposite for at least two reasons. First, it concerned consumers and consumer protection, not businesses, which can be expected to know what rules govern their relationships with other businesses. Second, a PSP is deemed to know from this Order that it should object to ACAs if it does not desire them to go into effect.

⁵²*See* AFTA Reply Comments at 2.

⁵³We decline to impose a set thirty (30) day prior notification requirement as proposed by APCC. *See* Letter from Albert H. Kramer, Attorney, on behalf of APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 3-4 (filed May 21, 2004) (APCC May 21 *Ex Parte*). APCC reasons that it needs this much time to "make arrangements to collect compensation from those SBRs that have not entered into such agreements." *Id.* at 3. We disagree. While we encourage interexchange carriers to provide as much notice as possible of an ACA, we realize there may be certain circumstances where thirty (30) days notice may not be possible, such as when a new SBR enters the market, or when an SBR realizes late in a quarter that it will not be able to comply with the rule audit requirements. Alternatively, the relevant parties may agree to a shorter notification period. We also note that we do not require SBRs that intend to compensate PSPs pursuant to the rules to provide thirty (30) days advance notice that they will file an audit with the Commission. *See* 47 C.F.R. § 64.1310(c).

We also decline to prohibit interexchange carriers and SBRs from terminating their ACAs mid-quarter. *See* APCC June 15 *Ex Parte* at 2 (arguing that this would be disruptive). The parties are free to begin and terminate their ACAs at any time. If an SBR terminates its ACA mid-quarter, it will be in violation of the rules unless it has another ACA in place or it satisfies the tracking, compensation and audit requirements of our rules. *See* 47 C.F.R. §§ 64.1310(a), 64.1320.

ACAs on its clearinghouse's website, in advance of the effective date of the ACAs, to be adequate notice under the current rules.⁵⁴

16. We also agree with APCC that PSPs should be notified prior to the termination of an ACA.⁵⁵ Our audit rules require a Completing Carrier to file its audit, as well as a statement with its contact information, on the first day of the calendar quarter for which the Completing Carrier will pay compensation based on that *carrier's* own call tracking system.⁵⁶ We imposed this rule so that the PSPs would know who was going to pay them and how they were going to be paid.⁵⁷ For the same two reasons, we believe that notice of the beginning and of the termination of an ACA is necessary to alert the PSPs to watch for either an audit filing with the Commission or notice of a new ACA with another interexchange carrier.⁵⁸ If neither appears, the PSPs will then have the information they need to seek enforcement under our Payphone Compensation Rules.

17. *Carriers' Affirmative Defense.* Although, under the Commission's rules, a PSP must agree to an ACA before it is effective, we clarify that a PSP may not unreasonably object to an ACA.⁵⁹ We clarify

⁵⁴AT&T states that it "intends to post a letter on the NPC [National Payphone Clearinghouse] website notifying the PSPs that certain SBRs have agreed to have AT&T pay on their behalf on 100% of the delivered payphone calls." Letter from Martha Lewis Marcus, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed Apr. 27, 2004), Declaration of Michael Guerra (AT&T Guerra Decl.) at para. 20; see Letter from Michael F. Del Casino, Government Affairs Director, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed May 25, 2004) (AT&T May 25 *Ex Parte*) (attaching letter notifying PSPs that AT&T intends to pay on 100% of delivered payphone calls and asking PSPs to notify AT&T if they do not wish to be compensated in this manner). On AT&T's behalf, the NPC will work with PSPs to determine how much payphone compensation they are owed, as well as transmit AT&T's payphone compensation, Intermediate Carrier reports, and Completing Carrier reports to the PSPs. AT&T Guerra Decl. at paras. 5-9.

⁵⁵See APCC May 21 *Ex Parte* at 4. As with notification prior to the effective date of an ACA, we decline to establish a specific prior notification period for termination of an ACA because the circumstances of a particular termination may make it impossible for an SBR to comply. We note, however, that an SBR should give notice of termination as soon as practicable under its particular circumstances. See, e.g., Letter from Martha Lewis Marcus, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2 (filed July 21, 2004) (AT&T July 21 *Ex Parte*) ("AT&T will provide the PSPs commercially reasonable notice when AT&T learns of a SBR's change from Option 2 [where AT&T pays the PSPs on the SBR's behalf] to Option 1 (SBR pays payphone compensation directly to the PSPs) via the National Payphone Clearinghouse (NPC) website. AT&T agrees to be responsible for assuring that the notice is posted on the NPC website and that NPC will send a broadcast e-mail, within a commercially reasonable time, to alert the PSPs that a notice of the change has been posted on the NPC website.").

⁵⁶See 47 C.F.R. § 64.1320(b), (e).

⁵⁷See *Report and Order*, 18 FCC Rcd at 19992, para. 36.

⁵⁸If a Completing Carrier does not intend to enter into a new ACA to replace the terminating ACA, it must comply with our tracking, compensation, and audit rules and file an audit report with the Commission on the first day of the calendar quarter after the ACA terminates. See 47 C.F.R. §§ 64.1310(a), 64.1320(c).

⁵⁹47 C.F.R. § 64.1310(a). We agree with AT&T and other commenters that the Commission should clarify what type of PSP consent to an ACA is necessary between an interexchange carrier and an SBR in order for the SBR to be relieved of its Completing Carrier's payment, tracking, reporting, and audit obligations set forth in section 64.1310(a) and section 64.1320 of our rules.

our rules in this *manner* because the record developed in this reconsideration proceeding demonstrates that PSPs may use their veto power over ACAs in order to extract certain terms and conditions from interexchange carriers.⁶⁰ Such behavior would have the effect of deterring interexchange carriers and SBRs from entering into ACAs. Accordingly, to ensure a level-playing field for interexchange carriers, SBRs, and PSPs, we clarify our rules to make clear that PSPs do not hold unlimited veto power over an ACA. Thus, in a complaint proceeding under these rules, a Completing Carrier may assert as an affirmative defense that a PSP's objection to an ACA was unreasonable and may thereby be relieved of its section 64.1310(a) and 64.1320 obligations.⁶¹

18. Section 64.1310(a)'s purpose is to encourage parties (especially small parties) to negotiate any type of private ACAs that diminish their respective administrative burdens in complying with the Payphone Compensation Rules. Demands by PSPs that ACAs contain certain unreasonable provisions or, alternatively, *unreasonable* objections by PSPs to ACAs that contain certain provisions, undermine this objective. When we adopted the ACA rule allowing carriers to opt out of the Payphone Compensation Rules, we expected that the parties, including PSPs, would be reasonable in their negotiations.⁶² We provide guidance to the contracting parties on what constitutes an unreasonable objection below. These defenses may be asserted in a complaint proceeding brought by a PSP against an SBR.

19. We find per se unreasonable a PSP's objection to an ACA on the basis that it does not contain a provision imposing ultimate liability on the interexchange carrier for payphone compensation on calls where it is not the *Completing Carrier*.⁶³ Because this objection would deter interexchange carriers from entering into ACAs with SBRs, such an objection to the ACA would prevent SBRs from voluntarily opting out of the rules, and would impose an undue burden on SBRs that cannot afford to implement their own audited call tracking systems. Provided the ACA does not contain other provisions that may harm a PSP's interests, we also find it is per se unreasonable for a PSP to object to an ACA that contains the following provisions, which we believe protect the interests of the SBR, PSP, and interexchange carrier:

⁶⁰For example, some PSPs indicate that they will only agree to ACAs that contain provisions that place liability on interexchange carriers for payphone compensation owed by SBRs. See AT&T Petition at 4-6 (proposing that, where an SBR agrees with an interexchange carrier that the SBR will pay for 100% of all payphone-originated calls that the interexchange carrier switches to the SBR, the Commission should infer a PSP's consent to such an arrangement); *contra* APCC Comments at 2-4 (APCC states that it would not agree to AT&T's proposal unless the interexchange carrier agreed to be liable for any failure of the SBR to pay); RBOC Coalition Comments at 3 (same); APCC Comments at 5 (objecting to AT&T's proposal because APCC contends that the interexchange carrier would have no incentive to track payphone calls accurately, and that in the event of disputed payments, the PSPs would be required to seek their compensation from the SBRs).

⁶¹See 47 C.F.R. §§ 64.1310(a), 64.1320.

⁶²APCC's insistence that an ACA contain a provision that forces interexchange carriers to assume ultimate responsibility for the payphone compensation obligations of SBRs would undermine the Commission's determination in the *Report and Order* that interexchange carriers are not liable for such payphone compensation and would deter interexchange carriers from entering into ACAs. APCC Comments at 2-4; APCC May 21 *Ex Parte* at 2.

⁶³APCC Comments at 2-4; APCC May 21 *Ex Parte* at 2. However, we recognize that interexchange carriers are free to enter into an arrangement that places ultimate liability on the interexchange carrier should this be a term and condition to which all parties agree.

100% Payment. According to the record, interexchange carriers MCI, Sprint, and AT&T have offered ACAs to SBRs whereby an SBR may voluntarily choose to pay payphone compensation based on 100% of all payphone-originated calls that the interexchange carrier transfers to the SBR's switch, and, on the SBR's behalf, the interexchange carrier will transmit the SBR payphone compensation payment to PSPs.⁶⁴ In its petition, AT&T argues that, where an ACA provides such 100% compensation, the Commission should not permit the PSPs to object to such an ACA because it "fairly" compensates the PSP for each and every completed call.⁶⁵ Our payphone rules fairly compensate PSPs by (1) requiring the primary economic beneficiary to pay, and (2) basing compensation on the most accurate call completion data available. We therefore agree with AT&T that, under its proposed 100% payment provision, the PSPs would be fairly compensated for every completed call because the Completing Carrier would pay for all payphone-originated calls switched to the Completing Carrier's platform, even if the Completing Carrier may not have completed some of those calls.⁶⁶ The compensation would also be based on accurate, verifiable call completion data because interexchange carriers are required as Intermediate Carriers to report on a quarterly basis all payphone-originated calls switched to a Completing Carrier as well as the identity of, and contact information for, the Completing Carrier.⁶⁷ We believe that such an ACA provision protects the interests of all parties by ensuring fair compensation.

⁶⁴See AT&T Petition at 4-6. AT&T has notified its SBR customers that AT&T will provide them a service to "direct AT&T to pay PSPs, on their behalf on 100% of all delivered calls to the [SBRs'] platform." AT&T Guerra Decl. at para. 17, Exs. C-E. In anticipation of the July 1, 2004 effective date of the new rules, AT&T requested that the SBRs notify AT&T by April 15, 2004 whether the SBRs wished to take this new service. AT&T Guerra Decl. at para. 19, Ex. D.

⁶⁵AT&T Petition at 4-6 (estimating that it has had business relations with as many as 5500 PSPs).

⁶⁶AT&T Petition at 4-6; Sprint Reply Comments at 8-9; MCI Reply Comments at 3. The interexchange carriers' proposals also appear to address APCC's concerns that, in later quarters, the interexchange carriers will deduct, or, in the PSPs' words "take back," overpayments to the PSPs by subtracting these overpayments from their current quarterly payments. See APCC May 21 *Ex Parte* at 2-3. Under the Commission's previous rules, after an interexchange carrier had compensated a PSP for a quarter, the interexchange carrier and the SBR would reconcile their data in the event that the SBR claimed it had completed fewer calls than the interexchange carrier had compensated for. See *id.* at 2. The interexchange carrier would then deduct a prior quarter's overpayment from future quarterly payments as part of its reconciliation with the PSPs. *Id.* The ACAs offered by MCI, AT&T, and Sprint are based on the interexchange carrier's data and not on an SBR's data; thus we anticipate that there will be no interexchange carrier-SBR reconciliation and subsequent "take backs" resulting from a reconciliation process. Rather, the PSP would receive compensation for 100% of all payphone-originated calls that the interexchange carrier transfers to the SBR's switch. The only type of "take backs" we envision would be based on system errors that resulted in overpayments to a PSP. APCC has no basis under the statute to demand that PSPs be entitled to keep overpayments. See, e.g., AT&T July 21 *Ex Parte* at 2 (stating that there will be no "takebacks" due to non-reimbursement of AT&T by the SBR, but AT&T reserves the right to implement normal business adjustments which may include corrections for duplicate payments to a PSP or paying the wrong PSP based on an incorrect AN).

⁶⁷See 47 C.F.R. § 64.1310(c). An Intermediate Carrier that failed to provide an accurate quarterly report would be in violation of this rule. We therefore disagree with APCC's argument that an interexchange carrier has a right to not properly track calls that it switches to a Completing Carrier. See APCC Comment at 10. We also disagree with APCC's last minute request that we should subject an Intermediate Carrier's reporting obligations to an audit. See APCC May 21 *Ex Parte*. An Intermediate Carrier is a facilities-based interexchange carrier that must comply with the Completing Carrier audit requirements to the extent that it completes any coinless calls, including toll-free code or subscriber toll-free numbers.

Remedies for a PSP. A provision in an ACA that gives a PSP remedies, either informally or in court, against an SBR for nonpayment would address past problems PSPs have suffered in recovering compensation.⁶⁸ Such a provision might include making the PSP a third party beneficiary to the ACA.⁶⁹

Compensation based on interexchange carrier call tracking data. A PSP must have reliable data upon which to seek compensation in the event that there is a failure of an ACA. In the event that an SBR voluntarily agrees to a payphone compensation formula based on an interexchange carrier's data, whether it be 100% of all calls switched to the SBR's platform or some lower number, an ACA that requires the SBR to pay based on that compensation formula if there is a dispute between the SBR and a PSP over the appropriate payment amount protects the PSP's interests. In an enforcement action, a PSP would not have accurate evidence upon which to collect compensation if the Completing Carrier were permitted to reject the ACA and to instead rely on its own unaudited call tracking data, for in the *Report and Order* we found that a call tracking system must be audited in order to meet the terms of the statute.⁷⁰ If a PSP were faced with litigation with no call completion data, or unaudited call completion data, this would not protect the PSP's interest in receiving compensation for each and every completed call.

20. We therefore conclude that, in a complaint proceeding brought by a PSP alleging that an SBR had violated its audit, reporting, and tracking responsibilities under our rules, a Completing Carrier may assert as an affirmative defense that the PSP's objection to the ACA was unreasonable and that the Completing Carrier is paying compensation per the terms of the ACA.⁷¹ Such a finding would lead to the conclusion that the ACA is valid and binding, and the Completing Carrier will not be found liable for violation of sections 64.1310(a) and 64.1320 provided that the Completing Carrier continued to compensate the PSP in accordance with the ACA.⁷² We remind Completing Carriers that compensation

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free payphone calls and does not make other compensation arrangements. Among other things, these rules require the carrier to have in place a system that tracks payphone-originated telephone calls. See 47 C.F.R. § 64.1320(c). This audit requirement, coupled with the interexchange carrier's financial incentive to track all calls directed to an SBR so that the interexchange carrier may recover its own costs for carrying the calls, are sufficient guarantees of data reliability. Weighing the reliability of this data and the burden another audit requirement would impose, we decline to grant APCC's request.

⁶⁸See *Report and Order*, 18 FCC Rcd at 19979-80, 19982-83, paras. 11, 16, 18 (discussing inability of PSPs to obtain compensation). See APCC May 21 *Ex Parte* at 2 (agreeing that it would be unreasonable for a PSP to object to AT&T's 100% proposal, "provided that the PSP is actually paid on 100% of the calls terminated to the SBR's switch").

⁶⁹Other mechanisms to make a PSP a beneficiary of the ACA might also be reasonable, such as a notification to the PSP giving the PSP an opportunity to object to the ACA, and inferring the PSP's approval of the ACA in the absence of an objection. See, e.g., AT&T May 25 *Ex Parte* (attaching letter notifying PSPs that AT&T intends to pay on 100% of delivered payphone calls and asking PSPs to notify AT&T if they do not wish to be compensated in this manner). See also AT&T July 21 *Ex Parte* at 2 (clarifying that AT&T will pay for calls delivered to SBRs while its agreements with them are in effect whether or not AT&T is reimbursed by the SBR).

⁷⁰See *Report and Order*, 18 FCC Rcd at 19987, 19993, paras. 26, 38 (audit ensures accurate call data).

⁷¹See 47 C.F.R. § 64.1310(a).

⁷²This affirmative defense can only be asserted in a proceeding brought by the PSP against the Completing Carrier for violation of the payphone compensation rules.

must be made on a timely basis, and that disputes regarding the applicability of payphone compensation requirements or whether a PSP's objection to an ACA was unreasonable do not excuse a Completing Carrier from its payment obligation.

21. We note that interexchange carriers, PSPs, and SBRs are free to enter into any type of ACA, so long as all parties agree to all terms and conditions of the ACA. We applaud the efforts of AT&T and APCC to reach reasonable accommodations, as reflected in recent *ex partes* filed in this proceeding.⁷³ Our clarification here is limited only to those situations where a PSP unilaterally attempts to impose unreasonable conditions on an ACA between an SBR and an interexchange carrier. Although the focus of this discussion has been PSP objections to ACAs between interexchange carriers and SBRs, the reasonableness standard clarified here applies to all ACA negotiations. We encourage parties to be creative in establishing their payment arrangements and in no way intend to preclude them from doing so.⁷⁴

C. Reporting Requirements

1. Uncompleted Calls

22. We reject APCC's request that the Commission require Completing Carriers to report on a quarterly basis *uncompleted* calls – calls that are attempted but not completed (*i.e.*, not answered by the called party).⁷⁵ According to APCC, PSPs must have access to this information to verify that they are being paid for all completed calls.⁷⁶ As explained below, the *Report and Order* has placed extensive

⁷³ We note that significant gaps have been closed between these parties on issues as diverse as notice of the beginning and termination of AT&T's payments on behalf of SBRs; AT&T payment to PSPs during the term of agreements even where an SBR fails to pay AT&T; and adjustments for payments made in error. *See* Letter from Albert H. Kramer *et al.*, Counsel for APCC, to Marlene H. Dortch, Secretary, FCC, Docket No. 96-128 (filed July 26, 2004); AT&T July 21 *Ex Parte*; AT&T June 30 *Ex Parte*. These recent filings indicate exactly the type of reasonable commercial arrangements that the Commission had in mind when it adopted the rules permitting parties to contract around our audit requirements for Completing Carriers paying compensation directly to PSPs. We decline to adopt APCC's proposed detailed rule, however, because we believe it is necessary for other parties to have flexibility to work out the details of agreements like this. *See, e.g.*, Letter from Larry Fenster, Senior Economist, MCI, to Marlene H. Dortch, Secretary, FCC, Docket No. 96-128 (filed July 29, 2004) (noting that AT&T chose an agreement that is currently "most appropriate for its [AT&T's] customer base and business strategy"). A one-size-fits-all approach could deter innovative approaches. *See id.* at 2 ("Intermediate Carriers will have little incentive to perform this intermediary function for the SBR competitors."); *see* Letter from John E. Benedict, Senior Attorney, Sprint to Marlene H. Dortch, Secretary, FCC, Docket No. 96-128 (filed Aug. 18, 2004) ("APCC's conditions would likely compel [Intermediate Carriers] to either curtail or eliminate these [contract] offerings.").

⁷⁴ After parties have entered into an ACA, we would consider disputes regarding the performance, terms and responsibilities under these ACAs to be private contractual disputes, rather than disputes concerning violations of the Act, that would be addressed by the courts. Parties could also choose to include dispute resolution provisions in their ACAs that allow for private mediation or arbitration.

⁷⁵ APCC Petition at 20-21.

⁷⁶ *Id.* APCC, for example, states that PSPs could compare a Completing Carrier's reports of completed call volumes with its reports of uncompleted call volumes to determine if there are unusually low completed call ratios. *Letterport* from Albert H. Kramer, Attorney, APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 5 (filed June 1, 2004) (APCC June 1 *Ex Parte*).

requirements on carriers to ensure that payment is based on accurate data: they must create tracking systems, file System Audit Reports, create a dispute resolution process, provide Completing and Intermediate Carrier Reports, and have their CFOs certify their quarterly payments. We find that these verification requirements address APCC's concerns. In light of these requirements, we agree with commenters that the imposition of yet another reporting requirement imposes a burden and cost on carriers that outweighs any marginal benefit to PSPs.⁷⁷

23. First, in the *Report and Order*, the Commission required Completing Carriers to obtain an independent audit to ensure that the Completing Carrier's call tracking system accurately tracks payphone calls to completion.⁷⁸ This "System Audit Report" must be filed with the Commission on the effective date of the rules and annually thereafter.⁷⁹ As part of its review, the third-party auditor must attest to whether the Completing Carrier has adequate and effective business rules for implementing and paying payphone compensation, including rules used to: (i) identify calls originated from payphones; (ii) identify compensable payphone calls; (iii) identify *incomplete or otherwise noncompensable* calls; and (iv) determine the identities of the PSPs to which the SBR owes compensation.⁸⁰ Although APCC argues that our audit rules are insufficient to ensure payment on all completed calls, APCC does not present any evidence to support its assertions.⁸¹ Moreover, APCC fails to indicate why a carrier's procedures for identifying uncompleted calls do not address its concerns. Our Payphone Compensation Rules not only require auditors to attest to whether the Completing Carrier can identify uncompleted calls, but under our rules PSPs are entitled to gain access to the auditor's working papers underlying a carrier's "System Audit Report."⁸²

24. Second, Completing Carriers must also develop a dispute resolution process. Our rules require that the third-party auditor attest to whether the Completing Carrier has implemented procedures and controls needed to resolve disputes.⁸³ To meet this requirement, AT&T states that its dispute resolution process is posted on the NPC website and PSPs can contact one of two managers whose job

⁷⁷MCI Comments at 17; Sprint Comments at 16; AT&T Comments at 14; AT&T Reply at 5-6.

⁷⁸The third-party auditor must verify the following criteria: (1) whether the Completing Carrier's procedures accurately track calls to completion; (2) whether the Completing Carrier has a person or persons responsible for tracking, compensating, and resolving disputes concerning payphone completed calls; (3) whether the Completing Carrier has effective data monitoring procedures; (4) whether the Completing Carrier adheres to established protocols to ensure that any software, personnel or any other network changes do not adversely affect its payphone call tracking ability; (5) whether the Completing Carrier has created a compensable payphone call file by matching call detail records against payphone identifiers; (6) whether the Completing Carrier has procedures to incorporate call data into required reports; (7) whether the Completing Carrier has implemented procedures and controls needed to resolve disputes; (8) whether the independent third-party auditor can test all critical controls and procedures to verify that errors are insubstantial; and (9) whether the SBRs have adequate and effective business rules for implementing and paying payphone compensation. 47 C.F.R. § 64.1320(c).

⁷⁹47 C.F.R. § 64.1320(b) and (f).

⁸⁰47 C.F.R. § 64.1320(c)(9). See 47 C.F.R. § 64.1320(d).

⁸¹APCC Reply at 15-16.

⁸²47 C.F.R. § 64.1320(g).

⁸³47 C.F.R. § 64.1320(c)(7).

responsibility is to address payphone compensation disputes.⁸⁴ AT&T also notes that in reviewing the dispute it may “provide the PSP with additional information to address the dispute... [such as the] call type, time of call, call duration, if the call was completed or not, and the termination phone number.”⁸⁵ The Payphone Compensation Rules not only ensure that carriers have an accurate and reliable payphone compensation system but also a process to resolve disputes efficiently.⁸⁶

25. Third, under the new Payphone Compensation Rules, PSPs receive two reports – the Completing Carrier and Intermediate Carrier reports – to assist them in identifying compensable and noncompensable calls. The Completing Carrier report must contain the following information: “(i) a list of the toll-free and access numbers dialed from each of that payphone service provider’s payphones and the ANI for each payphone; [and] (ii) the volume of calls for each number identified in paragraph (a)(4)(i) of this section that were completed by the Completing Carrier . . .”⁸⁷ The Intermediate Carrier report, which is intended to show all calls delivered to the SBR platform, must include a list identifying all facilities-based long distance carriers to which the Intermediate Carrier switched toll-free and access code calls dialed from each of that PSP’s payphones.⁸⁸ The Completing Carrier and Intermediate Carrier reports together provide PSPs with verifiable information to identify completed calls. As noted by AT&T, PSPs may examine “what was identified as payable by the SBR [in the Completing Carrier report] and then reference the Intermediate [Carrier’s] Report . . .”⁸⁹ The basis for requiring the two reports is “to enable a PSP to identify SBRs that are not compensating it and to challenge the payments in instances where the PSP may believe that the data provided by other facilities-based long distance carriers are out of proportion to the data provided by the final SBR in the call path.”⁹⁰

26. Fourth, the Commission required Completing Carriers to submit a sworn statement by the CFO that the payment amount for that quarter is accurate and is based on 100% of all completed calls.⁹¹ As explained in section III.C.5 below, this requirement was intended to ensure that call completion data is accurate and that payment is based on 100% of all completed calls.⁹²

⁸⁴ AT&T Guerra Decl. at para. 13.

⁸⁵ *Id.* at para. 15. We recognize that Completing Carriers do have access to uncompleted call data. APCC June 1 *Ex Parte* at 7. However, the record reflects that Completing Carriers would need to significantly modify their tracking systems in order to be able to store and generate reports on uncompleted calls. See e.g., Letter from Larry Fenster, Senior Economist, Law and Public Policy, MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed May 10, 2004) (MCI May 10 *Ex Parte*), Declaration of Dianne Moore at para. 16 (MCI Moore Decl.); Letter from John E. Benedict, Senior Attorney, Federal Regulatory Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed June 15, 2004) (Sprint June 15 *Ex Parte*).

⁸⁶ MCI Comments at 17-18; MCI Moore Decl. at para. 16.

⁸⁷ 47 C.F.R. § 64.1310(a)(4).

⁸⁸ 47 C.F.R. § 64.1310(c)(1).

⁸⁹ AT&T Guerra Decl. at para. 7.

⁹⁰ *Report and Order*, 18 FCC Rcd. at 20003, para. 52.

⁹¹ 47 C.F.R. § 64.1310(a)(3).

⁹² *Report and Order*, 18 FCC Rcd at 19998, para. 44.

27. We find that PSPs have numerous safeguards and resources – the System Audit Reports, dispute resolution processes, Completing and Intermediate Carrier reports, and CFO certifications – that, in combination, will give PSPs the tools to verify whether they are being fully compensated.⁹³ In addition, we find that the burden and cost to carriers to report uncompleted calls outweigh any marginal, additional benefit to PSPs of receiving uncompleted call data on a quarterly basis. According to AT&T, the initial cost would be \$4 million and the annual expenses related to store the additional data would be approximately \$1 million.⁹⁴ Under the new Payphone Compensation Rules, the Commission has already imposed extensive requirements on Completing and Intermediate Carriers, and carriers are incurring substantial expenses to comply with our audit rules.⁹⁵

2. Call Duration

28. For the same reasons noted above, we reject APCC's request that the Commission amend section 64.1310(g) to require carriers to maintain call duration data – the beginning and ending time of calls. To ensure that a PSP has access to necessary data in the event of a dispute with a Completing Carrier, we adopted section 64.1310(g) which requires a carrier to retain: (1) all of the data required for its quarterly report; and (2) the time and date of every call identified in its quarterly report.⁹⁶ APCC argues that duration data is key information for assessing whether calls are being correctly reported as uncompleted.⁹⁷ According to APCC, call duration data is useful because PSPs may investigate non-payment of lengthy calls.⁹⁸ APCC further adds that uncompensated lengthy calls may indicate possible "systematic errors" in tracking completed calls.⁹⁹

29. We agree with commenters that the cost to carriers to maintain call duration outweighs any additional benefit to PSPs.¹⁰⁰ Furthermore, call duration may not be a reliable indicator as to whether the

⁹³We recognize that an audit alone does not guarantee that the tracking system is error-free as noted by APCC. APCC June 1 *Ex Parte* at 4-5. As explained above, the PSP will have other safeguards to ensure that it is compensated for completed calls.

⁹⁴AT&T Guerra Decl. at para. 12. See MCI Moore Decl. at paras. 11-14; Letter from Ann D. Berkowitz, Associate Director, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2 (filed May 21, 2004) (Verizon May 21 *Ex Parte*) (claiming that it would cost at least \$4.3 - \$6.3 million to modify the network and switches to provide uncompleted call data); Sprint June 15 *Ex Parte* at 2 (estimating that modifying its LEC network for reporting of uncompleted calls and storage of call duration would cost \$9 million or more and require at least six and as much as twelve months development time). See Section IV.C.2, *infra*.

⁹⁵AT&T Guerra Decl. at para. 6. See MCI Moore Decl. at para. 10 (MCI will spend over \$500,000 for the System Audit Report).

⁹⁶*Report and Order*, 18 FCC Rcd at 19999, 20002-03, paras. 45, 51. See 47 C.F.R. § 64.1310(g).

⁹⁷APCC Petition at 21.

⁹⁸APCC Reply at 15.

⁹⁹APCC Petition at 21; APCC June 1 *Ex Parte* at 2.

¹⁰⁰See AT&T Guerra Decl. at 12 (AT&T states that any benefit from requiring Completing Carriers to provide call duration would be more than outweighed by the administrative burden and costs); Sprint Comments at 16-17; Letter from Larry Fenster, Senior Economist, Law and Public Policy, MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2 (filed April 14, 2004) (MCI April 14 *Ex Parte*); Sprint June 15 *Ex Parte* at 1-2 (stating that in order to track and report noncompleted calls and to track and store call duration it would cost Sprint \$9 million to (continued....))

call was in fact completed.¹⁰¹ Our Payphone Compensation Rules, which include a comprehensive audit of the Completing Carrier's tracking system, CFO certification, and extensive reporting requirements, are more than sufficient to ensure that calls do not go uncompensated.¹⁰² PSPs will have many resources at their disposal to confirm that they are being properly compensated for completed calls.¹⁰³ Given all the safeguards to minimize "systemic errors" established in the *Report and Order* for PSPs, we find that there is no need to impose an additional call duration requirement.

3. Completed Calls

30. We grant AT&T's request to make clear that a Completing Carrier is responsible for reporting only those calls that are *completed* by the Completing Carrier and not calls that are uncompleted or are forwarded to other long distance carriers.¹⁰⁴ As explained above, the Completing Carrier report must contain the following information: "(i) a list of the toll-free and access numbers dialed from each of that payphone service provider's payphones and the ANI for each payphone; [and] (ii) the volume of calls for each number identified in paragraph (a)(4)(i) of this section that were completed by the Completing Carrier . . ."¹⁰⁵ The intent of section 64.1310(a)(4)(i) is to require reporting only of calls that the Completing Carrier completes.

31. With respect to calls that a facilities-based long distance carrier forwards to a Completing Carrier for completion, the carrier becomes an Intermediate Carrier as defined in our rules and, in those instances, is obligated to report those calls under section 64.1310(c).¹⁰⁶ Sections 64.1310(a)(4)(i) and 64.1310(c), thus, serve two different purposes and were not intended to duplicate the reporting

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modify its LEC network and \$1 million to modify its IXC operations); Letter from John E. Benedict, Senior Attorney, Federal Regulatory Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1 (filed July 8, 2004). *But see* Letter from Albert H. Kramer, Attorney, APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 5 (filed July 28, 2004) (APCC July 28 *Ex Parte*) ("given that IXCs track completed call duration data [unlike uncompleted call data] in any event for billing purposes, it seems highly unlikely that more than a small fraction of Sprint's cost figures could be attributable to IXC tracking of the duration of completed calls.").

¹⁰¹ See AT&T Guerra Decl. at 11 (noting that payphone compensation does not vary with the length of a completed call, but only turns on whether the call has been completed); Sprint Comments at 17 (stating that, "where calls are handled by more than one carrier, recorded call times are never exactly alike.")

¹⁰² AT&T Comments at 14; MCI Comments at 19-20; Sprint Comments at 17.

¹⁰³ As noted above, AT&T states that under its dispute resolution process it may provide the PSP with call duration information. *See* para. 24, *supra*. Contrary to APCC's assertion that MCI did not address call duration at all, MCI states that PSPs with smart phones already have duration data by called number and can match this with data provided by the Intermediate Carrier report and that the additional development, storage, and reporting expense with call duration data does not justify any benefit to the PSP. *See* MCI April 14 *Ex Parte* at 2; APCC June 1 *Ex Parte* at 2.

¹⁰⁴ AT&T Petition at 2-4. Sprint, MCI, and Verizon agree with AT&T that the rule only requires Completing Carriers to report completed calls and not uncompleted calls or calls forwarded to an SBR. *See* Sprint Comments at 20-21; Sprint Reply at 7; MCI Comments at 17; Verizon May 21 *Ex Parte* at 1-2.

¹⁰⁵ 47 C.F.R. § 64.1310(a)(4).

¹⁰⁶ AT&T Petition at 2-3. *But see* RBOC Comments at 1-2.

requirements of one another. To avoid any confusion, we will amend our rules to clarify that only calls completed by the Completing Carrier need to be reported under section 64.1310(a)(4)(i).

4. Data Retention Period

32. We grant APCC's request to amend section 64.1310(g) and extend the data retention period to 27 months so that data is available throughout the two-year period during which a PSP may litigate payphone compensation disputes.¹⁰⁷ As noted above, section 64.1310(g) requires Completing Carriers and Intermediate Carriers to maintain for 18 months after the close of a payphone compensation quarter: (1) all of the data required for their quarterly reports; and (2) the time and date of every call identified in their quarterly reports. According to APCC, under the two-year statute of limitations granted by section 415 of the Communications Act, PSPs have a right to institute litigation 27 months after the close of the quarter in which payphone calls were made.¹⁰⁸ APCC states that PSPs receive payment typically 3 months after the close of the quarter.¹⁰⁹ Therefore, APCC contends that data should be maintained for a minimum of 27 months after the close of the quarter (*i.e.*, 24 months for the statute of limitations period plus 3 months for the calendar quarter).¹¹⁰

33. In the *Report and Order*, we adopted the 18-month time frame because the Commission's rules permit PSPs to claim ownership of a payphone, in order to be compensated for calls made from that payphone, up to 18 months after the close of a payphone compensation quarter and specifically require LECs to maintain payphone verification data for this period of time.¹¹¹ In light of APCC's argument, we find that it would be unreasonable to have a two-year statute of limitations but not require carriers to maintain data necessary for PSPs to prove their claims. We will therefore extend the 18-month data retention requirement to 27 months. This ensures that our compensation plan is "fair" to the PSPs by ensuring that they have access to data in the event of disputes with Completing Carriers.¹¹²

34. Commenters argue that APCC's request will increase costs while providing minimal benefits to PSPs, but they fail to provide in the record the actual cost of maintaining the data.¹¹³ We are not imposing any new data collection responsibilities; rather we merely require carriers to *maintain* the data an additional 9 months. While this may impose some additional cost, we find that the evidentiary benefits gained by the PSPs and all carriers outweigh any additional burden on carriers to maintain the data for a longer period of time.

¹⁰⁷APCC Petition at 19-20.

¹⁰⁸APCC Petition at 20.

¹⁰⁹*Id.* at 19.

¹¹⁰*Id.* at 20.

¹¹¹*Report and Order*, 18 FCC Rcd at 19999, 20002-03, paras. 45, 51.

¹¹²*Id.* at 19999, para. 45.

¹¹³Sprint Comments at 15; Sprint Reply at 4; MCI Comments at 19. RBOC supports APCC's request and states that, given the statute of limitations, data should be maintained for at least 27 months. RBOC Comments at 4.

5. Chief Financial Officer

35. We deny Sprint's request to amend section 64.1310(a)(3) of our rules to allow certification from any "corporate officer," instead of a chief financial officer (CFO).¹¹⁴ Section 64.1310(a)(3) of our rules requires a Completing Carrier to submit to its PSPs a sworn declaration from its CFO certifying that the Completing Carrier's quarterly payphone payments are accurate and based on 100% of all calls completed.¹¹⁵ Sprint argues that this requirement places an undue burden on large corporations and that no party in this proceeding has suggested that a CFO's signature is warranted.¹¹⁶

36. We are not persuaded by Sprint's assertion that the CFO requirement places an undue burden on large corporations. We do not expect CFOs to personally manage the day-to-day handling of payphone tracking and compensation, as implied by Sprint. We do, however, expect that each Completing Carrier – whether large or small – has instituted appropriate procedures and directed personnel so that the CFO can confidently certify that the payment amount for that quarter is accurate and based on 100% of completed calls. Although we acknowledge that no commenter requested CFO certification in the *Report and Order*, Qwest proposed to require annual certification by any corporate officer.¹¹⁷ We rejected that specific proposal because we believed that carriers might appoint someone without sufficient authority within the company over payphone compensation.

37. Commenters argue that the purpose of the certification will be served to the same degree if another officer signs the certification.¹¹⁸ We disagree. Given the history of carriers neglecting their payphone responsibilities, it is especially important that each Completing Carrier be held responsible for compliance with our rules, and that one person at each carrier hold this responsibility.¹¹⁹ The most appropriate person to certify is not any corporate officer, but the officer in charge of the company's finances. CFOs are responsible for the finances of the company and we see no reason to depart from our requirement.¹²⁰ Furthermore, we believe our certification requirement is reasonable in light of other rules

¹¹⁴Sprint Petition at 2. Pursuant to section 64.1310 of our rules, the Completing Carrier must compensate the PSP and provide the CFO statement on a quarterly basis. 47 C.F.R. § 64.1310(a)(2) and (3).

¹¹⁵47 C.F.R. § 64.1310(a)(3).

¹¹⁶Sprint Petition at 2. *But see* APCC Reply at 17-18.

¹¹⁷*Report and Order*, 18 FCC Rcd at 19998, para. 44 n.124.

¹¹⁸Qwest Comments at 2; RBOC Comments at 4; MCI Comments at 18 (supporting Sprint's request because it sees no additional benefits from requiring the CFO to make the certification).

¹¹⁹*See Report and Order*, 18 FCC Rcd at 19979-80, 19982-83, paras. 11, 16, 18.

¹²⁰We recognize that large corporations such as BellSouth have more than one CFO and may have a number of subsidiaries and affiliates. *See* Letter from Angela N. Brown, Regulatory Counsel for BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1-3 (filed May 18, 2004). If the Completing Carrier is a separate corporation with its own CFO, then it would be appropriate for the CFO from that affiliate or subsidiary to provide the quarterly certification. However, as we noted in the *Payphone Order*, to the extent that the Completing Carrier does not have a CFO, the CFO of any of the Completing Carrier's affiliated companies must file the required certification. A Completing Carrier may not avoid this requirement by asserting that it does not have a CFO. *Report and Order*, 18 FCC Rcd at 19998, para. 44 n.124. If the Completing Carrier is not a separate subsidiary or affiliate but is merely a line of business, the corporation's CFO must file the quarterly certification.

requiring CFOs to certify the companies' financial reports.¹²¹ Therefore, we reaffirm the Commission's decision in the *Report and Order* to require certification by the CFO as it will ensure that call completion data is accurate and that payment is based on 100% of all completed calls.¹²²

6. Uniform Reporting Standard

38. We also decline to grant APCC's request that the Commission establish a particular reporting format for the carriers' quarterly reports.¹²³ APCC states that PSPs receive reports in different and inconsistent formats and recommends that the Commission establish a uniform reporting format.¹²⁴ While commenters generally agree that carriers should follow national clearinghouse formats, no one, including APCC, proposes any particular format.¹²⁵ We believe that it is neither appropriate nor necessary for the Commission to make up a format on the basis of nothing more than a bare assertion that some format is necessary. To encourage consistency between the reports, however, we recommend that carriers follow one of the standard industry formats established by national clearinghouses.¹²⁶ After adopting a particular format, we also encourage carriers to continue using that format when submitting their quarterly reports to the PSPs.

D. Clarification of Statutory and Rule Terms

1. Clarification of a Completed Call

39. We decline to address APCC's request to clarify the definition of "completed call" to include calls answered by a carrier's platform because we find that it is beyond the scope of this proceeding.¹²⁷

¹²¹The Commission's auction rules require certification from an applicant's chief financial officer in instances where the applicant in an auction does not have audited financial statements. See 47 C.F.R. §§ 1.2110(n) and (o). The Securities and Exchange Commission, pursuant to the Sarbanes-Oxley Act of 2002, adopted rules requiring the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, each to certify in each quarterly and annual report submitted by the company under Section 13(a) or 15(d) of the Securities and Exchange Act. The certification requirement applies to annual reports on Forms 10-K, 10-KSB, 20-F and 40-F. The certification requirement also applies to quarterly reports on Forms 10-Q and 10-QSB. See e.g., Sarbanes-Oxley Act of 2002. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002). See 17 C.F.R. § 240.13a-14.

¹²²*Report and Order*, 18 FCC Rcd at 19998, para. 44.

¹²³APCC Petition at 22.

¹²⁴*Id.*

¹²⁵See e.g., AT&T Comments at 14-15 (AT&T does not object to APCC's request so long as the format used by the nationwide clearinghouses satisfies the requirement); Sprint Comments at 17 (arguing that "[i]t is neither appropriate nor necessary for the Commission to dictate the format that a carrier provide, so long as it is reasonable or consistent with industry norm").

¹²⁶See 47 C.F.R. § 64.1310(a)(4) and (c). We note that there appear to be only three national clearinghouses that provide reports for the long distance carriers – the National Payphone Clearinghouse, Billing Concepts Corporation, and Atlantax Systems, Inc. See, e.g., AT&T Guerra Decl. at para. 5; <www.billingconcepts.com> (viewed May 4, 2004); www.atlantax.com (viewed May 7, 2004).

¹²⁷APCC Petition at 22-23; APCC Reply at 17.

Section 276 is clear that a compensation plan should “fairly compensate” a PSP for “each and every completed intrastate and interstate call.”¹²⁸ The Commission has interpreted the statutory phrase “completed call” to mean “a call that is answered by the called party.”¹²⁹ APCC asks the Commission to clarify that completed calls are calls that: (1) a customer places to the carrier itself; (2) are placed to the carrier’s platform; or (3) are answered by a carrier’s automated processor.¹³⁰ APCC requests this clarification because it states that there have been disputes as to whether the definition of completed calls applies to those particular circumstances.¹³¹

40. We agree with commenters that APCC’s request to clarify the definition of completed calls contravenes section 1.106(d)(2) of our rules for petitions for reconsideration.¹³² Section 1.106(d)(2) states that a petition for reconsideration must “cite the findings of fact and/or conclusions of law which petitioner believes to be erroneous, and shall state with particularity the respects in which he believes such findings and conclusions should be changed.”¹³³ While the *Report and Order* adopted new procedures to accurately track calls to completion, the Commission made no findings on the definition of completed call. In fact, the Commission did not even request comment on the definition of a completed call in the *Further Notice*.¹³⁴ Moreover, we have not provided carriers with proper notice and an opportunity to comment on whether the definition of “completed call” should be altered, as mandated by the Administrative Procedure Act (APA).¹³⁵

¹²⁸ 47 U.S.C. § 276(b)(1)(A).

¹²⁹ *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-388, Report and Order, 11 FCC Rcd 20541, 20573-74, para. 63 (1996) (*First Payphone Order*); *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233, 21242, para. 14 (1996) (*Order on Reconsideration*); *The Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Memorandum Opinion and Order, 13 FCC Rcd 10893, 10915, para. 36 (1998) (*Coding Digit Waiver Order*).

¹³⁰ APCC Petition at 23.

¹³¹ *Id.* at 22.

¹³² AT&T states that APCC’s request to clarify the definition of completed calls is beyond the scope of the order and contravenes section 1.106(d)(2). AT&T Comments at 15. See Sprint Comments at 18; Sprint Reply at 6.

¹³³ 47 C.F.R. § 1.106(d)(2).

¹³⁴ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Further Notice of Proposed Rulemaking, 18 FCC Rcd 11003 (2003) (*Further Notice*).

¹³⁵ In January 2003, on a petition for review, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded this proceeding’s *Second Order on Reconsideration* on the grounds that parties were not afforded proper notice and opportunity for comment. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Second Order on Reconsideration, 16 FCC Rcd 8098 (2002); *remanded sub nom. Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

41. Although APCC acknowledges that the Commission did not address the definition of completed call in the *Report and Order*, APCC argues it is only seeking *clarification*, not reconsideration.¹³⁶ Regardless of how APCC phrases its request, we have no basis to reverse any decision in the *Report and Order* and no basis to determine whether a clarification in the definition would impose new burdens on carriers.

2. Payphone Compensation by a LEC

42. To ensure that LECs understand their obligations under the new payphone compensation rules, we grant APCC's request that the Commission clarify a LEC's obligations under the new rules.¹³⁷ The *Report and Order* clearly defined a Completing Carrier as "a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a *local exchange carrier* that completes a local, coinless access code or subscriber toll-free payphone call."¹³⁸ APCC is concerned that some LECs who pay PSPs through bill credits are not compensating PSPs for completed calls when a PSP is not served by the LEC or when the LEC acts as an interexchange carrier.¹³⁹

43. When an RBOC's interexchange carrier operation (or the interexchange unit of a LEC's business) completes a call, the interexchange carrier is liable for compensation regardless of whether the call is intra-LATA or inter-LATA. For example, if someone uses an interexchange carrier's coinless access code to make a local call, or if someone uses an interexchange carrier to make a local subscriber toll-free call, the interexchange carrier would be liable for the call. If an interexchange carrier is not involved in the switching of a local coinless access code call or a subscriber toll-free call, then the LEC that completes that call is liable for the call as a "Completing Carrier" under our rules. In other words, a LEC is responsible for compensation for calls made to access code numbers or subscriber toll-free numbers that a LEC maintains.

E. Other Issues

44. *Electronic Notification.* We clarify our rules regarding the notification of PSPs of Systems Audit Reports, section 64.1320(e) statements, and CFO certifications to alleviate the paperwork burden on Completing Carriers.¹⁴⁰ We will allow a Completing Carrier to post its "System Audit Report" and section 64.1320(e) statement setting forth its dispute resolution contact information on its website or a clearinghouse website. We also amend our rules to permit a Completing Carrier's CFO to issue a single, blanket certification covering all PSPs and to provide the certification to PSPs by posting it on the carrier's website or through any other electronic method. We make these amendments because we find that it would be unduly burdensome on small carriers to require them to send a copy of these documents

¹³⁶See APCC Reply at 16.

¹³⁷APCC Petition at 23.

¹³⁸47 C.F.R. § 64.1300(a) (emphasis added).

¹³⁹APCC Petition at 23.

¹⁴⁰See Section IV.C.5, *supra*.

to each of as many as 5500 PSPs.¹⁴¹ Because these carriers are required to file their System Audit Reports and section 64.1320(e) statements in the docket of this proceeding, PSPs will be able to ascertain where they may find electronic versions of these documents.

45. First, we will allow a Completing Carrier to post on its website or a clearinghouse website the "System Audit Report" and the section 64.1320(e) statement setting forth its dispute resolution contact information. The *Report and Order* required Completing Carriers to submit a "System Audit Report,"¹⁴² and at the same time a statement identifying the persons responsible for handling disputes to the Commission, the facilities-based long distance carriers, and *each* payphone provider.¹⁴³ We agree with commenters who argue that, in addition to the large number of PSPs, it is impossible for a carrier to know in advance from which payphones they may be required to complete calls for the upcoming quarter.¹⁴⁴ To provide the PSPs the information they need, we will require the Completing Carrier to include in its section 64.1320(e) statement the website address where the System Audit Report and dispute resolution contact information is located.

46. Second, the current CFO rule at section 64.1310(a)(3) requires the CFO to "submit to *each* payphone service provider to which compensation is tendered a sworn statement . . ."¹⁴⁵ The rule, as written, might be inferred to require a potential burdensome paperwork requirement.¹⁴⁶ The Commission did not intend to require CFOs to personally sign 5500 letters to PSPs, as implied by commenters.¹⁴⁷ Instead of providing a sworn statement directly to each PSP, companies may post a single, blanket statement to all PSPs on its website or on a clearinghouse website.¹⁴⁸ Completing Carriers may also transmit certifications electronically.¹⁴⁹ If a Completing Carrier decides to post the certification on a website, we will require the Completing Carrier to include in its quarterly report to the PSP the website address where the CFO certification is located. We believe this clarification of the CFO rule will help

¹⁴¹ AT&T Petition at 5; AFTA Reply at 1-8. APCC agrees that this is a reasonable means of providing CFO certifications and System Audit Reports to PSPs. Letter from Albert H. Kramer, Attorney, APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2-3 (filed June 16, 2004) (APCC June 16 *Ex Parte*).

¹⁴² 47 C.F.R. § 64.1320(b) and (f).

¹⁴³ 47 C.F.R. § 64.1320(e).

¹⁴⁴ AT&T Petition at 5; AFTA Reply at 4; Letter from Kathleen Greenan Ramsey, Counsel, 1-800 American Free Trade Association, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 2 (filed May 12, 2004) (AFTA May 12 *Ex Parte*).

¹⁴⁵ 47 C.F.R. § 64.1310(a)(3).

¹⁴⁶ See Sprint Petition at 2; Qwest Comments at 2; AFTA Reply at 7.

¹⁴⁷ Sprint Petition at 2; AFTA Reply at 4-5.

¹⁴⁸ In approving the paperwork collection requirements of the rules, the Office of Management and Budget (OMB) requested that the Commission make this paperwork clarification. See OMB Approval No. 3060-1046 (May 5, 2004). See AFTA May 12 *Ex Parte* at 1-2.

¹⁴⁹ AFTA Reply at 4-8.

mitigate Sprint's concerns regarding the possible administrative burden on CFOs from large corporations.¹⁵⁰

47. *Role of Carrier Clearinghouses.* Although AFTA presented issues for reconsideration in a filing entitled "Reply Comments," because many of its arguments were raised by other commenters and petitioners in this proceeding, and because our experience with the industry in implementing the rules indicates that additional guidance is needed, we will address them here.¹⁵¹

48. We disagree with AFTA's arguments that the new rules are overly burdensome and that the Commission should impose liability on clearinghouses in circumstances where an SBR contracts with a clearinghouse to compensate the PSPs on its behalf.¹⁵² First, we find that a clearinghouse may administer many of the rules' compensation tasks for an SBR.¹⁵³ We have recognized that compensating PSPs is an extraordinarily complex process, but that payphone clearinghouses have provided the industry with a streamlined mechanism for paying the PSPs.¹⁵⁴ A clearinghouse can handle all the administrative matters concerning compensation for the SBR. An SBR may submit a check to the clearinghouse for the total amount it owes PSPs in a particular quarter. The clearinghouse will then identify the individual PSPs that the SBR owes payment, and send the PSPs the payments and the quarterly reports on behalf of the SBR.¹⁵⁵ We are aware of three national clearinghouses that the interexchange carriers use in identifying, reporting, and compensating PSPs, and note that the SBRs may use these clearinghouses in this capacity as well. Thus, a small SBR need not recreate the work of one of these national

¹⁵⁰To the extent it was not clear before, we also clarify that a CFO certification is most appropriately made at the time that compensation for a quarter is paid.

¹⁵¹AFTA's Reply Comments should have been timely filed in a petition for reconsideration and the Commission rejects them based on these grounds. See 47 C.F.R. § 1.106(f).

¹⁵²AFTA Reply at 6-7. We disagree with AFTA's claim that the Commission failed to take into consideration the impact of the new rules on small SBRs. The Commission fully addressed the impact of the new rules on small carriers in the *Report and Order*. See *Report and Order*, 18 FCC Rcd at 20013, paras. 77-78.

¹⁵³APCC agrees that carriers may use clearinghouses to disburse compensation payments on the Completing Carrier's behalf provided that PSPs may also use clearinghouses to receive compensation on their behalf. APCC June 16 *Ex Parte* at 1.

¹⁵⁴*Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21305, para. 91 (2002). The Commission noted that "the industry has developed mechanisms to handle compensation, despite the fact that there are numerous carriers and numerous PSPs." *Id.* We understand that at the conclusion of each quarter, a carrier will submit to its clearinghouse that quarter's payphone data, including a list of the phone numbers of the payphones from which the carrier received calls and the volume of calls from each number that the carrier completed. The clearinghouse then matches the carrier's payphone call data with data submitted to them by various PSPs claiming ownership of certain payphone numbers. Once the clearinghouse has determined which phone numbers belongs to which PSPs, it then calculates the total amount of compensation owed each PSP collectively, from all of the clearinghouse carrier customers. The clearinghouse will then send the PSP a single check and the quarterly reports on behalf of all the carriers. This process generally takes a full calendar quarter to complete, thus, PSPs generally receive payment and quarterly reports three months after the close of the quarter.

¹⁵⁵One advantage of using a clearinghouse, as noted by MCI, is its ability to then aggregate all payments from carriers, thereby reducing the number of mailings submitted to each PSP. MCI Reply at 4.

clearinghouses, but may contract to them administrative tasks that might be more expensive for the SBR to do itself.¹⁵⁶

49. Second, the new rules squarely place liability on the primary economic beneficiary of the PSP services, *i.e.*, that carrier from whose switch a payphone call is completed.¹⁵⁷ We concluded that, because SBRs are the primary economic beneficiaries of coinless payphone calls transferred to their switches and because they possess the most accurate call completion information for such calls, it is appropriate as both a legal and policy matter to assign them liability under section 276 to fairly compensate the PSPs.¹⁵⁸ If a SBR enters into a contract with a clearinghouse whereby the clearinghouse will be responsible for fulfilling some of the SBR's rule obligations, the SBR is responsible under our rules the same as if the SBR satisfied the obligations in-house. We assume that if a clearinghouse mistake causes payphone compensation to be inaccurate, the SBR would have recourse against the clearinghouse.

50. *Clearinghouse Audit.* In the event that a Completing Carrier uses a clearinghouse to satisfy part of its rule compensation obligations, we clarify that the Completing Carrier's auditor may rely on a third-party audit of the clearinghouse in preparing its System Audit Report.¹⁵⁹ Since there are only a few clearinghouses, AFTA argues that requiring every SBR to conduct an audit of the clearinghouse process is unduly burdensome.¹⁶⁰ AT&T states that, if a Completing Carrier hires a clearinghouse, as part of the audit, the clearinghouse will submit to the Completing Carrier a report in accordance with Statement of Auditing Standards No. 70 (SAS 70) that certifies that the clearinghouse systems operate as set forth in the SAS 70.¹⁶¹ In auditing the Completing Carrier's tracking system, the auditor will rely on the statements made in the SAS 70 report.¹⁶² Because the record demonstrates that this is a standard auditing

¹⁵⁶MCI Reply at 4 (stating that AFTA's members should be able to rely upon either PSP ANI lists provided to them each quarter by LEC or purchase validated lists from established clearinghouses).

¹⁵⁷*Report and Order*, 18 FCC Rcd at 19988, para. 27.

¹⁵⁸*Id.*

¹⁵⁹AFTA May 12 *Ex Parte* at 1-2; Letter from Martha Lewis Marcus, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 at 1-2 (filed May 20, 2004) (AT&T May 20 *Ex Parte*); APCC June 16 *Ex Parte* at 2.

¹⁶⁰AFTA Reply at 4; AFTA May 12 *Ex Parte* at 2.

¹⁶¹AT&T May 20 *Ex Parte* at 1-2. See American Inst. of Certified Pub. Accountants, AICPA PROFESSIONAL STANDARDS: STATEMENT ON AUDITING STANDARDS AU § 324 REPORTS ON THE PROCESSING OF TRANSACTIONS BY SERVICE ORGANIZATIONS (1996) (codifying SAS No. 70); Dan M. Guy and D.R. Carmichael, WILEY PRACTITIONER'S GUIDE TO GAAS 2002 § 324 (2002) (describing SAS No. 70 and providing guidance to audit organizations).

¹⁶²AT&T May 20 *Ex Parte* at 1-2 (stating that the SAS 70 report process is used to gain assurances and represents that a service organization has been through an audit of its control activities, which generally include controls over information technology and related processes).

practice when a company has engaged a service organization to perform some of its obligations, we find that this complies with the audit requirements adopted at section 64.1320 of the Commission's rules.¹⁶³

V. PROCEDURAL MATTERS

A. Revised Final Paperwork Reduction Act Analysis

51. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

52. In this present document, we have assessed the effects of extending the time period that carriers must maintain verification data. The amendment to section 64.1310(g) which extends the time carriers must maintain verification data from 18 to 27 months will not adversely affect businesses with fewer than 25 employees. This amendment only requires carriers to maintain the data an additional 9 months and the cost and paperwork burden on carriers should be minimal. Furthermore, the amendment to section 64.1310(g) is in the public interest because it will help to ensure that the data is available throughout the statute of limitations period. We seek comment on this amendment.

B. Final Regulatory Flexibility Certification

53. As required by the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Certification (FRFC) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The FRFC is set forth in Appendix C.

VI. ORDERING CLAUSES

54. Accordingly, pursuant to authority contained in sections 1, 4, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154, and 276, IT IS ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED.

55. IT IS FURTHER ORDERED that part 64 of the Commission's rules, 47 C.F.R. Part 64, IS AMENDED by revising sections 64.1310(a) and (g), and section 64.1320(a), (b), and (e) as set forth in Appendix B to this Order on Reconsideration.

56. IT IS FURTHER ORDERED that the Petition for Clarification or Partial Reconsideration filed by APCC IS GRANTED IN PART AND DENIED IN PART, to the extent discussed herein.

¹⁶³*Id.* at 1-3 (adding that rather than subjecting the clearinghouse to multiple audits by each Completing Carrier's auditor, the SAS 70 report is used in the auditing world to achieve the same result). We note that, in some circumstances, an auditor may decide it is necessary to test the clearinghouse's systems.

57. IT IS FURTHER ORDERED that the Petition for Clarification or, in the Alternative, Reconsideration filed by AT&T IS GRANTED, to the extent discussed herein.

58. IT IS FURTHER ORDERED that the Petition for Reconsideration and Clarification filed by the RBOC Coalition IS DENIED.

59. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Sprint IS DENIED.

60. IT IS FURTHER ORDERED that the Request for Stay filed by APCC IS DENIED AS MOOT.

61. IT IS FURTHER ORDERED that for good cause found, except for the revisions to 47 C.F.R. 64.1310(g), which will go into effect upon publication in the Federal Register of OMB approval, the rules set forth in Appendix B ARE EFFECTIVE upon their publication in the Federal Register and that the portions of this *Order on Reconsideration* pertinent to them are effective at the same time.

62. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Order on Reconsideration*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

**APPENDIX A
LIST OF COMMENTERS**

**Parties Filing Petitions for Reconsideration
and/or Clarification**

Abbreviation

American Public Communications Council
AT&T Corp.
RBOC Payphone Coalition
Sprint Corporation

APCC
AT&T
RBOC
Sprint

Parties Filing Comments

APCC
AT&T
Qwest Communications International, Inc.
RBOC
Sprint
WorldCom, Inc.

Qwest

MCI

Parties Filing Replies

APCC
AT&T
MCI
RBOC
Sprint
1-800 American Free Trade Association

AFTA

**APPENDIX B
FINAL RULES**

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority for part 64 remains unchanged.
2. Section 64.1310 is amended by revising paragraphs (a) and (g) to read as follows:

(a) Unless the payphone service provider consents to an alternative compensation arrangement, each Completing Carrier identified in section 64.1300(a) shall compensate the payphone service provider in accordance with subsections (a)(1)-(a)(4). A payphone service provider may not unreasonably withhold its consent to an alternative compensation arrangement.

* * *

(g) Each Completing Carrier and each Intermediate Carrier must maintain verification data to support the quarterly reports submitted pursuant to paragraphs (a)(4) and (c) of this section for 27 months after the close of that quarter. This data must include the time and date that each call identified in paragraphs (a)(4) and (c) of this section was made. This data must be provided to the payphone service provider upon request.

3. Section 64.1310 is amended by revising subparagraph (a)(3) to read as follows:

(3) When payphone compensation is tendered for a quarter, the chief financial officer of the Completing Carrier shall submit to each payphone service provider to which compensation is tendered a sworn statement that the payment amount for that quarter is accurate and is based on 100% of all completed calls that originated from that payphone service provider's payphones. Instead of transmitting individualized statements to each payphone service provider, a Completing Carrier may provide a single, blanket sworn statement addressed to all payphone service providers to which compensation is tendered for that quarter and may notify the payphone service providers of the sworn statement through any electronic method, including transmitting the sworn statement with the section 64.1310(a)(4) quarterly report, or posting the sworn statement on the Completing Carrier or clearinghouse website. If a Completing Carrier chooses to post the sworn statement on its website, the Completing Carrier shall state in its 64.1310(a)(4) quarterly report the web address of the sworn statement.

4. Section 64.1310 is amended by revising subparagraph 64.1310(a)(4)(i) to read as follows:

(i) A list of the toll-free and access numbers dialed and completed by the Completing Carrier from each of that payphone service provider's payphones and the ANI for each payphone;

5. Section 64.1320 is amended by revising paragraphs (a), (b), and (e) to read as follows:

(a) Unless it has entered into an alternative compensation arrangement pursuant to section 64.1310(a) that relieves it of its section 64.1310(a)(1) tracking system obligation, each Completing Carrier must undergo an audit of its section 64.1310(a)(1) tracking system by an independent third party auditor whose responsibility shall be, using audit methods approved by the American Institute for Certified Public Accountants, to determine whether the call tracking system accurately tracks payphone calls to completion.

(b) By the effective date of these rules, each Completing Carrier in paragraph (a) of this section must file an audit report from the auditor (the "System Audit Report") regarding the Completing Carrier's compliance with section 64.1310(a)(1) as of the date of the audit with the Commission's Secretary in CC Docket No. 96-128 and with each payphone service provider for which it completes calls and with each facilities-based long distance carrier from which it receives payphone calls. A Completing Carrier may comply with this paragraph's requirement to file copies of the System Audit Report with each payphone service provider by posting the System Audit Report on its website or a clearinghouse website.

(e) At the time of filing of a System Audit Report with the Commission, the Completing Carrier shall file with the Commission's Secretary, the payphone service providers and the facilities-based long distance carriers identified in paragraph (b) of this section, a statement that includes the name of the Completing Carrier, and the name, address and phone number for the person or persons responsible for handling the Completing Carrier's payphone compensation and for resolving disputes with payphone service providers over compensation, and this statement shall be updated within 60 days of any changes of such persons. If a Completing Carrier chooses to notify payphone service providers of this statement and its System Audit Report by posting these two documents on its website or a clearinghouse website, then this statement shall include the web address for these two documents.

APPENDIX C
FINAL REGULATORY FLEXIBILITY CERTIFICATION

A. Final Regulatory Flexibility Certification

63. The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁶⁴ requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”¹⁶⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁶⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁶⁷ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁶⁸

64. As required by the RFA, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Federal Register summary of the *Further Notice*.¹⁶⁹ The Commission sought written public comments on the proposals in the *Further Notice*, including comments on the IRFA. On September 30, 2003, the Commission adopted a *Report and Order*¹⁷⁰ that included a Final Regulatory Flexibility Analysis (FRFA) that conformed to the RFA.¹⁷¹ In response to four petitions for reconsideration of the *Report and Order*, the Commission adopted this *Order on Reconsideration*.

¹⁶⁴The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁶⁵5 U.S.C. § 605(b).

¹⁶⁶5 U.S.C. § 601(6).

¹⁶⁷5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹⁶⁸15 U.S.C. § 632.

¹⁶⁹*Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 18 FCC Rcd 11003 (2003) (*Further Notice*). The *Further Notice* requested comment on how to implement rules requiring compensation to payphone service providers (PSPs) for dial-around calls under section 276 of the Communications Act, as amended. 47 U.S.C. § 276(b)(1)(A).

¹⁷⁰*Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 18 FCC Rcd 19975 (2003) (*Report and Order*). The *Report and Order* adopted payphone compensation rules requiring “Completing Carriers” to pay payphone compensation to PSPs for certain calls. For purposes of the payphone compensation rules, a “Completing Carrier” is defined as “a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call.” 47 C.F.R. § 64.1300(a).

¹⁷¹See 5 U.S.C. § 604.

65. In this *Order on Reconsideration*, the Commission clarifies its payphone compensation rules in ways that will not have a significant economic impact on a substantial number of small entities. As described below, the *Order on Reconsideration* essentially refines and builds upon the payphone compensation rules by clarifying certain ambiguities in the rules and by decreasing certain administrative burdens on carriers.

66. Specifically, we clarify the conditions that a payphone service provider (PSP) may impose on an alternative compensation arrangement (ACA) between an interexchange carrier (IXC) and a switch-based reseller (SBR). In the preceding *Report and Order*, the rules give parties flexibility to agree to ACAs to avoid compliance with any or all of the payphone compensation rules. However, in this *Order on Reconsideration*, we clarify that an ACA may be posted on the web to give PSPs adequate notice and time to object to the ACA. We also clarify that notice of termination may be placed on the web. This way, Completing Carriers will not be required to send a copy of the ACA and seek affirmative consent from as many as 5500 PSPs. We believe that these clarifications are merely administrative, and therefore the result of the use of the web will be to confer benefits rather than impose burdens on small SBRs. Therefore, these clarifications will not have a significant economic impact on small entities.

67. Additionally, the record in this proceeding demonstrates that PSPs might use their veto power over ACAs in a manner that would unreasonably interfere with an SBR's ability to enter into ACAs. For instance, demands by PSPs that an ACA contain a provision that forces IXCs to assume ultimate responsibility for the payphone compensation obligations of SBRs would undermine the Commission's determination in the *Report and Order* that IXCs are not liable for such payphone compensation. Such behavior would have the effect of deterring IXCs and SBRs from entering into ACAs. Accordingly, to ensure a level-playing field for IXCs, SBRs, and PSPs, we clarify our rules to make clear that PSPs do not hold unlimited veto power over an ACA. This *Order on Reconsideration* therefore clarifies that, in a complaint proceeding under the rules, a Completing Carrier may assert as an affirmative defense that the PSP's objection to an ACA was unreasonable. We believe this clarification confers a benefit on small SBRs by allowing them to freely enter into ACAs, thereby avoiding the costs of maintaining a tracking system as well as the costs of a large audit liability. Small PSPs will not be burdened by this ACA procedure because they will likely receive compensation for 100% of all payphone-originated calls, regardless of whether they are completed. For these reasons, we believe this clarification will not impose a significant economic impact on small entities.

68. We also clarify that Completing Carriers are only required to report *completed* payphone calls and not uncompleted calls or the duration that a circuit is kept open for such calls. In the preceding *Report and Order*, the Commission had already placed extensive requirements on carriers to ensure that payment is based on accurate data: they were obliged to create tracking systems, file System Audit Reports, create a dispute resolution process, provide Completing and Intermediate Carrier Reports, and have their chief financial officer (CFO) certify their quarterly payments. With respect to uncompleted and call duration, we find that the burden and cost to carriers to report this information outweigh any marginal, additional benefit to PSPs. By not adding additional costly reporting requirements on carriers, this clarification instead confers a benefit on small SBRs. Since no additional costs are being incurred or additional duties imposed on carriers, this clarification adopted in this *Order on Reconsideration* will not have a significant economic impact on small entities.

69. The rules also extend the data retention requirement for completed call data from 18 months to 27 months, because the statute of limitations for bringing lawsuits for payphone compensation is 24 months after the close of a calendar quarter, and because the PSPs need access to this data. Although a number of small SBRs will have to retain records for an additional 9 months, we believe the effect of this

revision will not be economically significant. Carriers were already required to retain this data for 18 months under the rules we adopted last year and therefore the effect of this change will be minimal. As we explain in the *Order on Reconsideration*, no commenter provided any data to support its position that it would unacceptably increase the cost for small entities. Should there be a minor increase in costs, that burden is outweighed by having the benefit of a more efficient record-keeping system.

70. To encourage consistency between the various reports required by the payphone compensation rules, we also clarify that carriers *should* follow one of the standard industry formats established by national clearinghouses. In this *Order on Reconsideration*, we do not require carriers to follow a particular format because we believe that it is neither appropriate nor necessary for the Commission to make up a format. Furthermore, parties did not quantify the cost to update the reports. In the event a small SBR decides to update the reports to meet industry standards, we believe the cost to do so will be minimal and therefore this clarification will not have a significant economic impact on small entities.

71. Similarly, the Commission's clarification concerning the responsibilities of local exchange carriers (LECs) as Completing Carriers does not significantly impact small entities. This clarification addresses a concern that some LECs who pay PSPs through bill credits are not compensating PSPs when a PSP is not served by the LEC or when the LEC acts as an IXC. In this *Order on Reconsideration*, we simply clarify that a LEC is responsible for compensation for calls made to access code numbers or subscriber toll-free numbers that a LEC *maintains*. We do not impose any additional responsibilities on LECs and therefore the clarification will not have a significant economic impact on small entities.

72. This *Order on Reconsideration* further clarifies and removes potentially burdensome paperwork requirements allowing the use of electronic methods to comply with our audit and CFO reporting requirements. First, we clarify that system audit reports may be posted on a website instead of requiring them to be sent to as many as 5500 PSPs. Second, these rules also clarify that a Completing Carrier CFO may certify the carrier's quarterly payments to all PSPs in a single document and may post this certification on the web, instead of sending individualized certifications to PSPs. The Commission believes that complying with the rules electronically is no more burdensome than submitting copies. It will also be less expensive for carriers to post the reports and certifications on the web rather than to send paper copies to PSPs. Therefore, these clarifications will not have a significant economic impact on small entities.

73. We also clarify that SBRs and other Completing Carriers may rely on a system audit of a payphone clearinghouse (instead of re-auditing the clearinghouse themselves). We expect that this clarification will benefit small SBRs economically because they will not have to pay for a separate audit of the clearinghouse.

74. Therefore, we certify that the requirements of the *Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities.

75. The Commission will send a copy of the *Order on Reconsideration*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.¹⁷² In addition, the *Order on Reconsideration* and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.¹⁷³

¹⁷²See 5 U.S.C. § 801(a)(1)(A).

¹⁷³See 5 U.S.C. § 605(b).